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Tang Heng Kit v Cindy Ong Pik Yin

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24F-294–09 OF 2021
EVROL MARIETTE PETERS J
28 DECEMBER 2022

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Evidence — Documentary evidence — Documents produced by computer and audio recording — Admissibility — Plaintiff adduced pictures, computer printouts and screenshots of WhatsApp messages and audio recording with its transcript — Whether documents produced by computer and audio recording was admissible

D

Family Law — Children — Guardianship — Application by plaintiff for sole guardianship, custody, care, and control of children — Plaintiff contended that defendant was unfit parent – Whether presumption in s 88(3) of Law Reform (Marriage and Divorce) Act had been rebutted — Whether plaintiff should have sole guardianship and custody, care and control of children — Whether plaintiff should have access to children

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This was an application by the plaintiff husband for, inter alia, sole guardianship, custody, care, and control of the three children of the marriage. The plaintiff, an IT director currently based in Malaysia was an American citizen, whilst the defendant, a Malaysian citizen who was a swimming coach and a competitive swimmer, were married in 2013. There were three children in the marriage, namely ENO, five years old; EEL, eight years old; and END, twelve years old ('the children'). By August 2021, the marriage had broken down and in September 2021, the defendant had left the matrimonial home with the children. The nub of the plaintiff's contention was that the defendant was unfit, based on the claim that she led a very liberal and exhibitionist lifestyle, indulged in extra marital affairs, and that she had brainwashed and abused the children, especially END. The plaintiff had, in a police report, made various allegations of abuse by the defendant against END. In support of the averments made against the defendant, the plaintiff adduced as evidence, pictures, computer printouts and screenshots of WhatsApp messages and an audio recording with its transcript. At the outset, the defendant objected to the evidence on the basis that the computer printouts of the WhatsApp messages (or documents produced by a computer) were not accompanied by a certificate pursuant to s 90A(2) of the Evidence Act 1950 ('the EA'). The defendant had also objected to the audio recording adduced by the plaintiff to establish the brainwashing of the children.

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Held, dismissing the application:

(1) The EA, by virtue of s 2, did not apply to affidavit evidence. Since the issues in the present case, such as abuse and adultery were highly contentious, it would be extremely unsuitable to establish it by way of affidavit evidence, especially where it was based unconvincingly on messages and photographs alone. Besides that the audio recording, WhatsApp messages and transcript could not be relied upon, the terminology used by the plaintiff such as 'affair' and 'extra martial relations' were vague and ambiguous. The plaintiff had the legal burden to prove such adulterous relationship by virtue of s 103 of the EA, but the evidence adduced by the plaintiff had not reached the threshold of proof (see paras 9, 11, 13 & 15).

(2) The recording of conversations and its transcript adduced by the plaintiff was inadmissible as the authenticity had not been established. Conversations in isolation and taken out of context could not be considered by the court in concluding that there was abuse, brainwashing or even adultery (see para 21).

(3) In determining who should have guardianship and custody of the children, the factor that must be given priority was the welfare of the children, as prescribed by s 88 of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA') and s 11 of the Guardianship of Infants Act 1961. The photographs of the defendant uploaded on social media, although brazen and unconventional, had nothing to do with her parenting skills. The defendant's conduct in flaunting her body may make her an exhibitionist and even a narcissist at most, but it could not be concluded that such behaviour would compromise her parenting skills (see paras 23 & 29).

(4) The presumption in s 88(3) of the LRA favoured the defendant, as the mother, and it was, therefore, for the plaintiff to rebut the presumption on a balance of probabilities, by adducing evidence to convince the court that the defendant should be denied custody, care and control of ENO, on the ground that she was an unfit mother. However, the disputes and increasing acrimony between the plaintiff and the defendant were caused by unresolved issues between themselves and had nothing to do with the defendant's fitness (or otherwise) as the mother of ENO. It would not be in the interest of the welfare of the children to remove them from their current environment, where they also had the comfort and love of extended family members, such as the defendant's mother. The plaintiff had failed to rebut the presumption in s 88(3) of the LRA (see paras 35–36, 38 & 40).

(5) Although the presumption in s 88(3) of the LRA did not technically apply, since EEL was above seven years of age, it was undeniable that she

was still young and would be reaching puberty in a few years' time. In light of that, EEL would need her mother, the defendant, for support. The plaintiff would not be in a position to provide the mental and emotional support required of a girl as precocious as EEL who would also feel awkward and embarrassed to discuss female-oriented issues with her father. In light of EEL's hormonal and physical development, the defendant would be in a better position to understand and cater to EEL's needs and provide her the emotional support as the defendant had been doing all along (see paras 41–42 & 45).

(6) The police report in relation to the alleged physical abuse of END was lodged only on 9 October 2021. However, the abuse, according to the plaintiff's narrative, allegedly occurred way back in 2019, 2016 and 2012. The words 'at or about the time when the fact took place' in s 157 of the EA had been interpreted to mean 'the first reasonable opportunity' or 'as speedily as could reasonably be expected'. The police report was not made 'at or about the time when the fact took place' to render it a contemporaneous document. As such, being a self-serving statement, the police report was compromised and carried very little weight. The children informed that the defendant was indeed strict and a disciplinarian with regard to their swimming practices and competitions. However, that such conduct did not amount to abuse, as there was no wilful and intentional harm inflicted on the children. Primary care and control of the children should remain with the defendant, whilst joint guardianship and custody should be granted to both plaintiff and defendant (see paras 47–50 & 52–53).

(7) The decision to grant joint guardianship and custody, as well as primary care and control of the children to the defendant was fortified by the children's wishes. All children expressed their desire to live with the defendant. The children had a close relationship, and it would, therefore, be undesirable to separate them. As such, the children should not be separated, and should, therefore, remain with the defendant (see paras 54, 56, 58 & 60).

(8) The children should not be removed from their current environment. They appeared to be well-adjusted and have been attending school and other co-curricular activities without any disturbance and had developed a loving relationship with the defendant's family members, especially the defendant's mother. Granting sole guardianship and custody, as well as care and control to the plaintiff would disrupt the children's routine, bearing in mind also that the plaintiff, being a US citizen, whilst remaining in Malaysia on a spousal visa, was a flight risk as he would, at any time, be able to leave Malaysia with the children for good, if granted sole guardianship and custody, as well as primary care and control. As

such, the plaintiff was granted joint guardianship and custody, as well as liberal access to the children (see paras 61, 63 & 65).

(9) Both plaintiff and defendant should co-parent the children. Pursuant to s 3 of the Guardianship of Infants Act 1961, both parents had equal responsibilities for the children's support, health, and education. The correlation to the parties' responsibilities was the rights of the children to bond with both parents (see paras 71–72).

[Bahasa Malaysia summary

Ini adalah permohonan oleh plaintif suami untuk, antara lain, pemeliharaan, penjagaan dan kawalan tunggal ketiga-tiga anak perkahwinan. Plaintif, seorang pengarah IT yang kini berpangkalan di Malaysia adalah warganegara Amerika, manakala defendan, warganegara Malaysia yang merupakan jurulatih renang dan perenang yang kompetitif, telah berkahwin pada 2013. Dalam perkahwinan itu terdapat tiga orang anak iaitu ENO, lima tahun; EEL, lapan tahun; dan END, dua belas tahun ('anak'). Menjelang Ogos 2021, perkahwinan itu telah berpecah belah dan pada September 2021, defendan telah meninggalkan rumah perkahwinan bersama anak-anak. Inti pati pertikaian plaintif adalah bahawa defendan tidak layak, berdasarkan dakwaan bahawa dia menjalani gaya hidup yang sangat liberal dan ekshibisionis, terlibat dalam hubungan sulit luar perkahwinan, dan bahawa dia telah membasuh otak dan mendera kanak-kanak, terutamanya END. Plaintif telah, dalam laporan polis, membuat pelbagai dakwaan penderaan oleh defendan terhadap END. Sebagai menyokong penegasan yang dibuat terhadap defendan, plaintif mengemukakan sebagai keterangan, gambar, cetakan komputer dan tangkapan skrin mesej WhatsApp dan rakaman audio dengan transkripnya. Pada awalnya, defendan membantah keterangan atas dasar bahawa cetakan komputer bagi mesej WhatsApp (atau dokumen yang dihasilkan oleh komputer) tidak disertakan dengan sijil menurut s 90A(2) Akta Keterangan 1950 ('AK'). Defendan juga telah membantah rakaman audio yang dikemukakan oleh plaintif untuk membuktikan pembasuhan otak anak tersebut.

Diputuskan, menolak permohonan:

(1) AK, menurut s 2, tidak terpakai kepada keterangan afidavit. Memandangkan isu-isu dalam kes ini, seperti penderaan dan perzinaan adalah sangat kontroversial, adalah amat tidak sesuai untuk membuktikannya melalui keterangan afidavit, terutamanya apabila ia berdasarkan mesej dan gambar secara tidak meyakinkan sahaja. Selain rakaman audio, mesej WhatsApp dan transkrip yang tidak boleh disandarkan, istilah yang digunakan oleh plaintif seperti 'hubungan sulit' dan 'hubungan luar perkahwinan' adalah kabur dan samar-samar. Plaintif mempunyai beban undang-undang untuk membuktikan hubungan zina itu berdasarkan s 103 AK, tetapi keterangan yang

dikemukakan oleh plaintif tidak mencapai ambang pembuktian (lihat perenggan 9, 11, 13 & 15). A

(2) Rakaman perbualan dan transkripnya yang dikemukakan oleh plaintif tidak boleh diterima kerana kesahihannya belum dipastikan. Perbualan secara berasingan dan di luar konteks tidak boleh dipertimbangkan oleh mahkamah dalam membuat kesimpulan bahawa terdapat penderaan, pembasuhan otak atau pun perzinaan (lihat perenggan 21). B

(3) Dalam menentukan siapa yang patut mendapat pemeliharaan dan penjagaan anak, faktor yang mesti diutamakan ialah kebajikan anak, seperti yang ditetapkan oleh s 88 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('AMU') dan s 11 Akta Penjagaan Kanak-Kanak 1961. Gambar-gambar defendan yang dimuat naik di media sosial, walaupun kurang sopan dan tidak konvensional, tidak ada kaitan dengan kemahiran keibubapaannya. Kelakuan defendan dalam mempamerkan tubuhnya mungkin menjadikan dia seorang ekshibisionis dan juga seorang narsisis, tetapi tidak boleh disimpulkan bahawa tingkah laku tersebut akan menjejaskan kemahiran keibubapaannya (lihat perenggan 23 & 29). C D

(4) Anggapan dalam s 88(3) AMU memihak kepada defendan, sebagai ibu, dan oleh itu, adalah bagi plaintif untuk menyangkal anggapan atas imbangan kebarangkalian, dengan menambah keterangan untuk meyakinkan mahkamah bahawa defendan harus dinafikan hak penjagaan dan kawalan ENO, atas alasan bahawa dia seorang ibu yang tidak layak. Walau bagaimanapun, pertikaian dan pertelingkahan yang semakin meningkat antara plaintif dan defendan adalah disebabkan oleh isu yang tidak dapat diselesaikan antara mereka dan tidak ada kaitan dengan kelayakan defendan (atau sebaliknya) sebagai ibu kepada ENO. Ia tidak akan menjadi kepentingan kebajikan anak untuk mengeluarkan mereka dari persekitaran semasa mereka, di mana mereka juga mendapat keselesaan dan kasih sayang ahli keluarga besar, seperti ibu defendan. Plaintif telah gagal untuk menyangkal anggapan dalam s 88(3) AMU (lihat perenggan 35–36, 38 & 40). E F G

(5) Walaupun anggapan dalam s 88(3) AMU secara teknikal tidak terpakai, memandangkan EEL berumur atas tujuh tahun, tidak dapat dinafikan bahawa dia masih muda dan akan mencapai akil baligh dalam masa beberapa tahun. Sehubungan itu, EEL memerlukan ibunya, defendan, untuk sokongan. Plaintif tidak akan berada dalam kedudukan untuk memberikan sokongan mental dan emosi yang diperlukan oleh seorang gadis seusia EEL yang juga akan berasa janggal dan malu untuk membincangkan isu berorientasikan wanita dengan bapanya. Berdasarkan perkembangan hormon dan fizikal EEL, defendan akan berada dalam kedudukan yang lebih baik untuk memahami dan memenuhi keperluan EEL dan memberikannya sokongan emosi seperti H I

yang telah dilakukan oleh defendan selama ini (lihat perenggan 41–42 & 45).

(6) Laporan polis berhubung dakwaan penderaan fizikal END hanya dibuat pada 9 Oktober 2021. Bagaimanapun, penderaan itu, menurut naratif plaintif, didakwa berlaku sejak 2019, 2016 dan 2012. Perkataan 'pada atau lebih kurang pada masa fakta itu telah berlaku' dalam s 157 AK telah ditafsirkan sebagai 'peluang munasabah pertama' atau 'secepat yang boleh dijangka secara munasabah'. Laporan polis itu tidak dibuat 'pada atau lebih kurang pada masa fakta itu telah berlaku' untuk menjadikannya sebagai dokumen semasa. Oleh itu, sebagai satu kenyataan untuk diri sendiri, laporan polis itu telah dikompromi dan membawa berat yang sedikit. Anak memaklumkan bahawa defendan sememangnya tegas dan seorang yang mementingkan disiplin terhadap latihan renang dan pertandingan mereka. Walau bagaimanapun, kelakuan sedemikian tidak sama dengan penderaan, kerana tidak ada kemudaratan yang disengajakan ke atas anak. Penjagaan dan kawalan utama kanak-kanak harus kekal bersama defendan, manakala pemeliharaan dan penjagaan bersama harus diberikan kepada kedua-dua plaintif dan defendan (lihat perenggan 47–50, 52 & 53).

(7) Keputusan untuk memberikan pemeliharaan dan penjagaan bersama, serta kawalan utama anak kepada defendan telah diperkuatkan oleh kehendak anak. Anak menyatakan keinginan mereka untuk tinggal bersama defendan. Anak mempunyai hubungan rapat, dan oleh itu, tidak diingini untuk memisahkan mereka. Oleh itu, anak tidak seharusnya dipisahkan, dan oleh itu, hendaklah kekal bersama defendan (lihat perenggan 54, 56, 58 & 60).

(8) Anak tidak boleh dialihkan dari persekitaran semasa mereka. Mereka kelihatan menyesuaikan diri dengan baik dan telah menghadiri sekolah dan aktiviti kokurikulum lain tanpa sebarang gangguan dan telah menjalinkan hubungan kasih sayang dengan ahli keluarga defendan, terutamanya ibu defendan. Pemberian pemeliharaan dan penjagaan tunggal, serta kawalan kepada plaintif akan mengganggu rutin anak, dengan mengambil kira bahawa plaintif, sebagai warganegara Amerika, semasa berada di Malaysia dengan visa pasangan, adalah satu risiko pelarian kerana dia boleh, pada bila-bila masa, meninggalkan Malaysia bersama anak untuk selamanya, jika diberi pemeliharaan dan penjagaan tunggal, serta kawalan utama. Oleh itu, plaintif telah diberikan pemeliharaan dan penjagaan bersama, serta akses liberal kepada anak (lihat perenggan 61, 63 & 65).

(9) Kedua-dua plaintif dan defendan hendaklah mendidik anak bersama. Menurut s 3 Akta Penjagaan Kanak-Kanak 1961, kedua-dua ibu bapa mempunyai tanggungjawab yang sama untuk sokongan, kesihatan, dan pendidikan anak-anak. Korelasi dengan tanggungjawab pihak-pihak

adalah hak anak-anak untuk menjalin hubungan dengan kedua ibu bapa (lihat perenggan 71–72).]

Cases referred to

APE v APF [2015] SGHC 47, CA (refd)
Adams v Adams [1984] FLR 768, CA (refd)
Amanah Raya Capital Sdn Bhd v Siti Zaharah bt Sulaiman [2013] MLJU 490, HC (refd)
CX v CY [2005] 3 SLR 690, CA (refd)
CY v CC [2015] MLJU 930, HC (folld)
Chai Sau Yin v Kok Seng Fatt [1966] 2 MLJ 54; [1966] 1 LNS 25, FC (refd)
Clarkson v Clarkson [1930] 143 LT 775 (refd)
Datuk Nur Jazlan bin Tan Sri Mohamed & Ors v T Gopala Krishnan [2017] MLJU 412; [2017] 1 LNS 402, HC (refd)
GGC v CCC [2016] MLJU 377; [2016] 1 LNS 885, HC (refd)
Gan Koo Kea v Gan Shiow Lih (f) [2003] 4 MLJ 770; [2003] 1 LNS 440, HC (refd)
Jambri bin Abd Hamid v PP [2009] 9 MLJ 683, HC (refd)
K Shanta Kumari v Vijayan [1986] 2 MLJ 216; [1985] 1 LNS 135 (refd)
Khoo Cheng Nee v Lubin Chiew Pau Sing [1996] 4 MLJ 171; [1996] 1 LNS 579, HC (refd)
Leong Sam Moy v Low Chee Thiam [1996] MLJU 640; [1997] 2 CLJ Supp 212, HC (refd)
Mahabir Prasad v Mahabir Prasad [1982] 1 MLJ 189, FC (refd)
Manokaram a/l Subramaniam v Ranjid Kaur a/p Nata Singh [2009] 1 MLJ 21; [2008] 6 CLJ 209, FC (refd)
Mohd Ali Jaafar v PP [1998] 4 MLJ 210, HC (refd)
Ooi Mei Chein @ Wei Mei Chein v Micheal Tan Cheng Hai & Anor [2014] 9 MLJ 449; [2013] 1 LNS 1090, HC (refd)
PP v Balveer Singh a/l Mahindar Singh [2009] 1 MLJ 386, HC (refd)
PP v Mohamed Terang bin Amit [1999] 1 MLJ 154; [1999] 5 CLJ 156, HC (refd)
PP v Paneerselvan & Ors [1991] 1 MLJ 106; [1990] 2 CLJ 833, HC (refd)
PP v Teo Eng Chan [1988] 1 MLJ 156; [1988] 1 CLJ 425 (refd)
Sahari bin Masrom v PP [2009] 2 MLJ 859, HC (refd)
Sean O' Casey Patterson v Chan Hoong Poh & Ors [2011] 4 MLJ 137; [2011] 3 CLJ 722, FC (folld)
Securities Commission v Lee Kee Sien, Albert and Others [2009] MLJU 117; [2009] 8 CLJ 70, HC (refd)
Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah [2000] 6 MLJ 48; [2000] 3 CLJ 175, HC (refd)
Tan Erh Ling v Ong Khong Wooi [2021] MLJU 1583; [2021] 1 LNS 1325, HC (refd)
Tan Sherry (P) v Soo Sheng Fatt (L) [2016] MLJU 1264; [2016] 1 LNS 1586, HC (refd)

A *Tan Siew Kee v Chua Ah Boey* [1987] SLR 549 (refd)
Teh Eng Kim v Yew Peng Siong [1977] 1 MLJ 234, FC (refd)
Yong May Inn v Sia Kuan Seng [1971] 1 MLJ 280; [1970] 1 LNS 176 (folld)

Legislation referred to

B Evidence Act 1950 ss 2, 90A, 90A(2), 103, 157
Guardianship of Infants Act 1961 ss 3, 5, 11
Law Reform (Marriage and Divorce) Act 1976 ss 88, 88(2)(b), (3)

Ezane Chong (Ariff Rozhan & Co) for the plaintiff.
C *Kamales Shanmugam (Kamales & Partner) for the defendant.*

Evrol Mariette Peters J:

INTRODUCTION

D

[1] This was an application ('this application') by the plaintiff husband for, inter alia, sole guardianship, custody, care, and control of the three children of the marriage.

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[2] In the interest of privacy, and considering the sensitivity of the issues in these proceedings, the three children of the marriage have been anonymised in this judgment as END, EEL, and ENO respectively.

F THE FACTUAL BACKGROUND

[3] The plaintiff, an IT Director currently based in Malaysia is an American citizen, whilst the defendant, a Malaysian citizen who is a swimming coach and a competitive swimmer, were married in 2013. There were three children in the G marriage, namely, ENO, five years old, EEL, eight years old, and END, twelve years old, ('the children'), although it was undisputed that END was not the biological son of the plaintiff.

[4] By August 2021, the marriage had broken down and in September H 2021, the defendant had left the matrimonial home with the children, after obtaining an interim protection order against the plaintiff from the Kuala Lumpur Magistrate's Court. The interim protection order was subsequently discharged in January 2022.

I

[5] On 30 September 2021, the plaintiff filed this application, which was dismissed for the following reasons.

CONTENTIONS, EVALUATION, AND FINDINGS

[6] The nub of the plaintiff's contention was that the defendant was unfit, based on the claim that she led a very liberal and exhibitionist lifestyle, indulged in extra marital affairs, and that she had brainwashed and abused the children, especially END.

ADMISSIBILITY OF DOCUMENTS PRODUCED BY COMPUTER

[7] In support of the averments made against the defendant, the plaintiff had adduced as evidence, pictures, computer printouts and screen shots of WhatsApp messages, and an audio recording inclusive of its transcript.

[8] At the outset, the defendant's counsel objected to this evidence on the basis that the computer printout of WhatsApp messages (or documents produced by a computer) were not accompanied by a certificate pursuant to s 90A(2) of the Evidence Act 1950 ('the Evidence Act') which reads:

> Section 90A — Admissibility of documents produced by computers, and of statements contained therein
>
> ...
>
> (2) For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by *tendering to the court a certificate* signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used. (Emphasis added.)

[9] It is trite law that the Evidence Act, by virtue of s 2, does not apply to affidavit evidence. The section reads:

> Section 2 — Extent
>
> This Act shall apply to all judicial proceedings in or before any court, *but not to affidavits presented to any court* or officer nor to proceedings before an arbitrator. (Emphasis added.)

[10] This was made clear in a plethora of authorities including *Securities Commission v Lee Kee Sien, Albert and Others* [2009] MLJU 117; [2009] 8 CLJ 70, and *Amanah Raya Capital Sdn Bhd v Siti Zaharah bt Sulaiman* [2013] MLJU 490. In fact, in *Securities Commission v Lee Kee Sien, Albert & Ors*, the application of s 90A of the Evidence Act in an interlocutory application involving affidavit evidence was addressed by Nallini Pathmanathan JC (as she then was) in the following passage:

> It is trite that the *provisions of the Evidence Act 1950 do not apply to affidavit evidence*

in the course of interlocutory civil proceedings. It is therefore incorrect, in an interlocutory application for an injunction; to invoke the various provisions of the Evidence Act 1950 including s 90A and object to affidavit testimony on the grounds that it is hearsay. (Emphasis added.)

[11] Although I agreed with counsel for the plaintiff that the provisions of the Evidence Act do not apply to affidavit evidence, I have to state, at this juncture, that since the issues in the present case, such as abuse and adultery were highly contentious, it would be extremely unsuitable to establish it by way of affidavit evidence, especially where it was based unconvincingly on messages and photographs alone.

[12] In trying to convince the court that the defendant was an unfit mother, the plaintiff had attempted to adduce evidence to show that the defendant had an affair with a Swedish national, one Frederic Liljestrom, whom she had coached and trained with.

[13] Besides alluding to my ruling above that the audio recording, WhatsApp messages and transcript could not be relied upon, the terminology used by the plaintiff such as 'affair' and 'extra martial relations' were vague and ambiguous. If what the plaintiff meant was an adulterous relationship, then reference should be made to *Clarkson v Clarkson* [1930] 143 LT 775, 46 TLR 623, which defined the concept as 'voluntary sexual intercourse between a man and woman, who are not married to each other, but one of them is at least a married person'.

[14] From the definition, other forms of sexual contacts short of sexual intercourse is not adultery, though parties may be said to have an affair or that they have been unfaithful to their spouse. In other words, it is not adultery of the mind that is being made punishable with a damages award against the adulterer or adulteress, but the physical act that had resulted in the breakdown of the marriage of the innocent party;. per Lee Swee Seng J (as he then was) in *GGC v CCC* [2016] MLJU 377; [2016] 1 LNS 885.

[15] Since the plaintiff had the legal burden to prove such adulterous relationship by virtue of s 103 of the Evidence Act, it was important to state, at this juncture, that the evidence adduced by the plaintiff had not reached the threshold of proof.

[16] In any event, even if the plaintiff's allegation of the defendant's adulterous relationship was true, it may have rendered the defendant an immoral and promiscuous person, but not an unfit parent. It must be borne in mind that there is a plethora of authorities, including the Federal Court cases of *Chai Sau Yin v Kok Seng Fatt* [1966] 2 MLJ 54; [1966] 1 LNS 25 and

Manokaram a/l Subramaniam v Ranjid Kaur a/p Nata Singh [2009] 1 MLJ 21; [2008] 6 CLJ 209, to remind parties that this is a court of law and not of morals. As such, unless the defendant's purported adultery had contravened the law, or had a negative effect on the welfare of the children, it would be unfair to deem her an unfit parent.

[17] Reference was made also to *Khoo Cheng Nee v Lubin Chiew Pau Sing* [1996] 4 MLJ 171; [1996] 1 LNS 579, where Abdul Wahab Patail JC (as he then was) had opined in the following passage:

> ... Adultery, although frowned upon by our society, by itself is not a sufficient ground to disqualify a mother from having custody of her children. *Merely that another person has emerged in the Petitioner's life was not necessarily by itself bad for the children ...* (Emphasis added.)

[18] In fact, as stated in *Leong Sam Moy v Low Chee Thiam* [1996] MLJU 640; [1997] 2 CLJ Supp 212, 'the plaintiff's allegation that the defendant was having an adulterous relationship was not very relevant as this was not a divorce petition': per Zainun Ali JC (as she then was).

ADMISSIBILITY OF AUDIO RECORDING

[19] The defendant had also objected to the audio recording adduced by the plaintiff to establish, inter alia, the brainwashing of the children. With regard to the admissibility of the audio recording, it has been established and is now part of Malaysian jurisprudence via cases such as *Mohd Ali Jaafar v Public Prosecutor* [1998] 4 MLJ 210, *Public Prosecutor v Balveer Singh a/l Mahindar Singh* [2009] 1 MLJ 386, *Sahari bin Masrom v Public Prosecutor* [2009] 2 MLJ 859, *Jambri bin Abd Hamid v Public Prosecutor* [2009] 9 MLJ 683, and *Datuk Nur Jazlan bin Tan Sri Mohamed & Ors v T Gopala Krishnan* [2017] MLJU 412; [2017] 1 LNS 402, that the following common law rules pertaining to a tape recording are applicable before the same is admissible:

(a) the equipment was in proper working order;

(b) that the recording was not tampered with or altered in any way and it should be established in whose possession the recording was at all times;

(c) that the witnesses played the recording over after making it, and heard voices which they can identify;

(d) that a transcript was prepared of the voices; and

(e) that the witnesses played over the recording and checked it with the transcript as to the identity of the voices and as to the conversation.

[20] Although the common law rules enumerated above are in respect of tape recordings, courts must be cautious and test the authenticity of any type of recording, bearing in mind that although technology has been responsible for remarkable breakthroughs in several disciplines, it remains a double-edged sword, and has provided various methods of doctoring and tampering with evidence.

[21] In my view, the recording of conversations and its transcript adduced by the plaintiff was inadmissible as the authenticity had not been established. In any event, conversations in isolation and taken out of context cannot be considered by this court in concluding that there was abuse, brainwashing or even adultery.

The overriding factor — Welfare of the children

[22] It was apparent in this application that the plaintiff had focused mostly on the defendant's private life, in his attempt to convince this court that the defendant was not fit to have guardianship and custody, or even care and control of the children.

[23] At this juncture, it was apt to state that in determining who should have guardianship and custody of the children, the factor that must be given priority is the welfare of the children, as prescribed by s 88 of the Law Reform (Marriage and Divorce) Act 1976 ('Law Reform (Marriage and Divorce) Act') and s 11 of the Guardianship of Infants Act 1961 ('Guardianship of Infants Act'), both of which read:

> Law Reform (Marriage and Divorce) Act 1976
>
> Section 88 — Power for court to make order for custody
>
> (1) The court may at any time by order place a child in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the objects of which *include child welfare* or to any other suitable person.
>
> ...
>
> Guardianship of Infants Act 1961
>
> Section 11 — Matters to be considered
>
> The Court or a Judge, in exercising the powers conferred by this Act, *shall have regard primarily to the welfare of the infant* and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be. (Emphasis added.)

[24] The meaning of 'welfare of the child' was referenced in a plethora of

cases including *Teh Eng Kim v Yew Peng Siong* [1977] 1 MLJ 234, *Mahabir Prasad v Mahabir Prasad* [1982] 1 MLJ 189, *Tan Sherry (P) v Soo Sheng Fatt (L)* [2016] MLJU 1264; [2016] 1 LNS 1586, and *Tan Erh Ling v Ong Khong Wooi* [2021] MLJU 1583; [2021] 1 LNS 1325.

[25] I was also guided by the Federal Court in *Sean O' Casey Patterson v Chan Hoong Poh & Ors* [2011] 4 MLJ 137; [2011] 3 CLJ 722, in its reference to the Singapore case of *Tan Siew Kee v Chua Ah Boey* [1987] SLR 549, wherein the expression 'welfare of the child' was explained in the following manner by Chan Sek Keong JC (as he then was), in the following passage:

> The expression 'welfare' ... is to be taken in its widest sense. It means the general well-being of the child and all aspects of *his upbringing, religious, moral as well as physical. His happiness, comfort and security also go to make up his well-being. A loving parent with a stable home is conducive* to the attainment of such well-being. It is not to be measured in monetary terms. (Emphasis added.)

[26] The Federal Court in *Sean O'Casey Patterson v Chan Hoong Poh & Ors*, through the opinion of James Foong FCJ, proceeded to explain 'welfare of the child' in the following passage:

> [53] According to *Halsbury's Laws of England* (4th Ed, Reissue) (Mackay edition), para 443 the term, 'welfare principle' is a set of factors used when 'a court determines any question with respect to the upbringing of a child or the administration of a child's property or the application of any income arising from it, the child's welfare must be the court's paramount consideration'. In the English children Act 1989, under the heading 'welfare of the child' is a set of factors that must be taken into account when deciding on such cases. *These are for example: the wishes of the child; his feelings; his age; his sex and his background and the capabilities of the parties involved.* Thus, this term 'welfare principle' relates to certain factors to be considered and their priority during deliberation in such cases. (Emphasis added.)

[27] The meaning of 'welfare of the child', therefore, must be considered in the widest sense, and all factors necessary must be weighed against one another for this court to arrive at a decision. It would be impossible to enumerate specifics, since circumstances in each case are varied.

[28] The plaintiff had also made several averments regarding the defendant's attitude and her exhibitionist behavior, especially on social media, where she regularly uploaded partially or fully nude pictures of herself in various poses, for public viewing. The plaintiff claimed that such behavior rendered her unfit to have guardianship and custody or even primary care and control of the children. The plaintiff had also made an unsettling and alarming allegation that the defendant had tasked END to take such photographs.

[29] I was unable to accept the plaintiff's contention, as the photographs of the defendant uploaded on social media, although brazen and unconventional, had nothing to do with her parenting skills. The defendant's conduct in flaunting her body may make her an exhibitionist and even a narcissist at most, but I am unable to conclude that such behavior would compromise her parenting skills. In fact, the defendant, through her counsel, was even reprimanded by this court for uploading, on social media, a photograph of herself and the children taken in the courtroom on the day that the children were interviewed by the court. Although I had taken a dim view of the defendant's conduct, the focus of this court was the welfare of the children, and not the defendant's irksome behaviour.

[30] The plaintiff's allegation that END had taken the nude and semi-nude photographs of the defendant was merely speculative and unsubstantiated, and as such, this court was unable to entertain what appeared to be the plaintiff's mere hunch.

[31] I am mindful that the welfare of the children encompasses their moral upbringing. However, it was my view that this court must be cautious so as not to impose its own moral values on the parties and their children.

[32] Furthermore, a distinction must be drawn between private and public morality. The private conduct of a person which does not affect the community, society or public, does not warrant sanction or censure, and definitely not by this court. In my view, although it was inevitable for this court to wade into the realm of morality, this court should not assume the role of moral police and judge any litigant for moral transgressions, committed in private, save except where such moral transgressions descend into the arena of the child's life, and as a result, compromises the child's welfare.

[33] The plaintiff was understandably irked by the defendant's liberal lifestyle and exhibitionist behaviour online, but those were issues between the plaintiff and defendant, and had nothing to do with the fitness (or otherwise) of the defendant as a mother.

Whether presumption in s 88(3) of Law Reform (Marriage and Divorce) Act had been rebutted

[34] Since the youngest child, ENO, was five years old at the time of the hearing, the starting point is the application of the 'tender years' doctrine, found in s 88(3) of the Law Reform (Marriage and Divorce) Act, which reads:

> Section 88 — Power of court to make order for custody
>
> ...

(3) There shall be a rebuttable presumption that it is for the *good of a child below the age of seven years to be with his or her mother* but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody. (Emphasis added.)

[35] The presumption in s 88(3) of the Law Reform (Marriage and Divorce) Act favours the defendant as the mother, and it was, therefore, for the plaintiff to rebut the presumption on a balance of probabilities, by adducing evidence to convince this court that the defendant should be denied custody, care and control of ENO, on the ground that she was an unfit mother.

[36] However, after perusing the evidence adduced by both parties, I was of the view that the disputes and increasing acrimony between the plaintiff and defendant were caused by unresolved issues between themselves, and had nothing whatsoever to do with the defendant's fitness (or otherwise) as the mother of ENO.

[37] It was also crucial to note that although the parties had separated, all three children had continuously been with the defendant. She was the primary caregiver for the children since birth, while the plaintiff was mostly away working abroad. It was, therefore, undeniable that the children, even those older than seven years, continue to depend on the defendant for their physical, emotional and mental development, bearing in mind that the defendant is also their swimming coach.

[38] Hence, it would not be in the interest of the welfare of the children to remove them from their current environment, where they also have the comfort and love of extended family members, such as the defendant's mother. It was also crucial to note that the defendant had a more flexible work schedule, which enables her to address the children's needs. The plaintiff, on the other hand, with his schedule, had not convinced this court that he would be in a better position to care for the children.

[39] There is a plethora of cases including *K Shanta Kumari v Vijayan* [1986] 2 MLJ 216; [1985] 1 LNS 135, *Gan Koo Kea v Gan Shiow Lih (f)* [2003] 4 MLJ 770; [2003] 1 LNS 440 and *Teh Eng Kim v Yew Peng Siong*, where it had been explained that, when dealing with young children, it would be in the interest of their welfare to be with their mother. In *Teh Eng Kim v Yew Peng Siong*, the relationship between a young child and mother was detailed by Raja Azlan Shah FCJ (as he then was), in the following passage:

The youngest child, Bernard, is of tender years. In my opinion, his place right now is with the mother. '*No thing, and no person,' said Sir John Romilly MR, in the case of Austin v Austin [1865] 35 Beav 259 263 'and no combination of them, can, in my*

> *opinion, with regard to a child of tender years, supply the place of a mother, and the welfare of the child is so intimately connected with its being under the care of the mother, that no extent of kindness on the part of any other person can supply that place* ... This view has found judicial favour in many jurisdictions: in Australia, for example, in *Kades v Kades*,(4) the High Court, in a joint judgment stated: 'What is left is the strong presumption which is not one of law but is founded on experience and upon the nature of ordinary human relationships, that a young girl, should have the love, care and attention of the child's mother and that her upbringing should be the responsibility of her mother, if it is not possible to have the responsibility of both parents living together.' In Canada, Muloch CJ in *Re Orr* [1973] 2 DLR 77 commented that, 'In the case of a father and mother living apart and each claiming the custody of a child, the general rule is that the mother, other things being equal, is entitled to the custody and care of a child during what is called the period of nurture, namely, until it attains about seven years of age, the time during which it needs the care of the mother more than that of the father ... (Emphasis added.)

[40] In the final analysis, and based on my views regarding the defendant's behavior and conduct, as alluded to above, the plaintiff had failed to rebut the presumption in s 88(3) of the Law Reform (Marriage and Divorce) Act.

Whether plaintiff should have sole guardianship and custody, care and control of eight-year old daughter

[41] The second child, EEL, was eight and a half years old at the time this application was heard. Although the presumption in s 88(3) of the Law Reform (Marriage and Divorce) Act did not technically apply, since EEL was above seven years of age, it was undeniable that she was still young and would be reaching puberty in a few years' time.

[42] In light of that, I was of the view that EEL would need her mother, the defendant, for support. It is important to state, at this juncture, that in no uncertain terms am I making a general statement that fathers are incapable of providing the support required for their daughters. However, in this case, the plaintiff would not be in a position to provide the mental and emotional support required of girl as precocious as EEL, who would also feel awkward and embarrassed to discuss female-oriented issues with her father.

[43] On this point, I found instructive the case of *Yong May Inn v Sia Kuan Seng* [1971] 1 MLJ 280; [1970] 1 LNS 176, where in granting custody of three children to their mother, Sharma J opined in the following passage:

> ... The children are all girls and although it is not absolutely essential that they should remain in the custody and care of their mother, they are bound *to feel freer in her company than in the company of their father* and more particularly so *when one of them is reaching an age when she may need the advice of her mother most.* (Emphasis added.)

[44] The fact of the matter is, we live in a world where the comfort level of discussing certain delicate issues is dictated by the gender of the confidante, and when the choice of that confidante is a parent, a female pubescent child would tend to gravitate towards her mother.

[45] As such, in light of EEL's hormonal and physical development, the defendant would be in a better position to understand and cater to EEL's needs, and provide her the emotional support as the defendant had been doing all along.

Whether plaintiff should have sole guardianship and custody, care and control of 12-year old son

[46] The plaintiff had, in a police report, made various allegations of abuse by the defendant against END.

[47] I was unable to accept the plaintiff's contention for the simple reason that the police report in relation to the alleged physical abuse of END was lodged only on 9 October 2021. However, the abuse, according to the plaintiff's narrative, allegedly occurred way back in 2019, 2016 and 2012. In my view, if the abuse had actually taken place, as averred by the plaintiff, it begs the questions why the plaintiff had taken a considerable length of time to lodge the police report.

[48] Secondly, any police report lodged to corroborate an incident is made pursuant to s 157 of the Evidence Act, which reads:

> Section 157 — Former statements of witness may be proved to corroborate later testimony as to same fact
>
> In order to corroborate the testimony of a witness, any former statement made by him whether written or verbal, on oath, or in ordinary conversation, relating to the same fact *at or about the time when the fact took place,*or before any authority legally competent to investigate the fact, may be proved. (Emphasis added.)

[49] The words 'at or about the time when the fact took place' found in s 157 of the Evidence Act has been interpreted in *Public Prosecutor v Teo Eng Chan* [1988] 1 MLJ 156; [1988] 1 CLJ 425, *Public Prosecutor v Paneerselvan & Ors* [1991] 1 MLJ 106; [1990] 2 CLJ 833, and *Public Prosecutor v Mohamed Terang bin Amit* [1999] 1 MLJ 154; [1999] 5 CLJ 156, to mean 'the first reasonable opportunity' or 'as speedily as could reasonably be expected'.

[50] In the present case, it was undeniable that the police report lodged by the plaintiff was not made 'at or about the time when the fact took place' to

render it a contemporaneous document. As such, being a self-serving statement, the police report lodged by the plaintiff was compromised and carried very little weight, if at all.

[51] In fact, there was a high probability that the police report lodged by the plaintiff was an afterthought, especially since the defendant had earlier obtained an interim protection order on 24 September 2021 against the plaintiff. In fact, the plaintiff had not made any allegation of abuse at all by the defendant in his affidavit in support. He had only made those allegations in his reply, after the defendant had responded in her affidavit in response. It was also crucial to state that the photographs that the plaintiff had adduced in seeking to prove abuse could not be relied upon by this court as they were isolated incidents which were not indicative of any form of abuse.

[52] It was also important to state, at this juncture, that there is a thin line between disciplining the children and physically abusing them. In the present case, the defendant was also their swimming coach and like all competitive sports, an extreme amount of discipline is required. I had spoken to all three children and was informed that the defendant was indeed strict and a disciplinarian with regard to their swimming practices and competitions. However, it was my view that such conduct did not amount to abuse, as there was no wilful and intentional harm inflicted on the children.

[53] In fact, if at all there was abuse, the evidence had actually pointed towards the plaintiff, based on the evidence adduced during the time that the interim protection order was granted against the plaintiff. As such, it was my view that primary care and control of the children should remain with the defendant, whilst joint guardianship and custody should be granted to both plaintiff and defendant.

Children's wishes

[54] My decision to grant joint guardianship and custody, as well as primary care and control of the children to the defendant was fortified by the children's wishes during my interview with them, conducted pursuant to s 88(2)(b) of the Law Reform (Marriage and Divorce) Act, which reads:

> Section 88 — Power for court to make order for custody
>
> ...
>
> (2) In deciding in whose custody a child should be placed *the paramount consideration shall be the welfare of the child* and subject to this the court shall have regard —
>
> ...

(b) *to the wishes of the child*, where he or she is of an age to express an independent opinion. (Emphasis added.)

[55] Although both END and ENO were engaging, EEL, the daughter, was the most talkative and assumed the role of 'spokeswoman' for the children. She was articulate and expressed herself well.

[56] All children expressed their desire to live with the defendant. END explained that although the defendant was strict and regimented, he wished to continue remaining with her, as he felt that the defendant had his best interests at heart.

[57] I was able accept the defendant's parenting methods, as it was reasonable for her, as a former competitive swimmer and now a swimming coach, to expect her children to excel in the same sport. As such, the plaintiff's contention that this competitive streak in her made her an unfit mother, was bereft of merit.

[58] I had also observed during the interview that the children had a close relationship, and it would, therefore, be undesirable to separate them. 'children do ... support one another and give themselves mutual comfort, perhaps more than they can derive from either of their parents': per Dunn LJ in *Adams v Adams* [1984] FLR 768, which was adopted in *Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah* [2000] 6 MLJ 48; [2000] 3 CLJ 175 and *Ooi Mei Chein @ Wei Mei Chein v Micheal Tan Cheng Hai & Anor* [2014] 9 MLJ 449; [2013] 1 LNS 1090.

[59] In *Sivajothi K Suppiah v Kunathasan Chelliah*, it was stated by Faiza Thamby Chik J, in the following passage:

In General The Courts Dislike Separating children

In *Bromley's Family Law* (7th Ed, 1987) by Professor BM Bromley and NV Lowe at p 328 it is stated as follows:

Keeping the children together.

In general the courts dislike separating children. (Emphasis added.)

[60] As such, I took the view that the children in the present case should not be separated, and should, therefore, remain with the defendant.

Children's environment

[61] I was also of the view that the children should not be removed from their current environment. They appeared to be well-adjusted and have been

attending school and other co-curricular activities without any disturbance, and have developed a loving relationship with the defendant's family members, especially the defendant's mother.

[62] The children actively participated in swimming competitions and that the defendant is the parent who supervises their schedule. Furthermore, it was undisputed that END is a child with attention deficit hyperactivity disorder ('ADHD'), and I, therefore, drew guidance from the case of *CY v CC* [2015] MLJU 930 (a case that dealt with an autistic child), to fortify my decision that END should remain with the defendant.

[63] Granting sole guardianship and custody, as well as care and control to the plaintiff would disrupt the children's routine, bearing in mind also that the plaintiff, being a US citizen, whilst remaining in Malaysia on a spousal visa, is a flight risk as he would, at any time, be able to leave Malaysia with the children for good, if granted sole guardianship and custody, as well as primary care and control.

[64] At this juncture, I have to state that although the children had expressed their wish to remain with the defendant, EEL, had gone out of the way to say unsavoury things about the plaintiff without understanding some of the words she used. In this regard, it was my view that she may have been influenced by an adult to paint an unfavourable picture of the plaintiff.

[65] As such, although I had decided not to grant sole guardianship and custody of the children to the plaintiff, it was my view that he should be granted joint guardianship and custody, as well as liberal access to the children.

Whether plaintiff should have access to children

[66] It was crucial, therefore, to impress upon parties that the children have a right to have an ongoing and meaningful relationship with both parents. Although the defendant should have primary care and control of the children, no one parent is superior to the other. The dynamics of the relationship between a child with his/her father and that with his/her mother are different. It does not mean that a father's rights with regard to his child are inferior to that of the mother.

[67] Parties must be reminded of the role that a father has in ensuring that a child is raised in a nourishing environment. This was highlighted in the Singapore case of *APE v APF* [2015] SGHC 47, where reference was made by Tan Siong Thye J to an enlightening article *Contact and Domestic Violence — The Experts' Court Report* [2000] Fam Law 615 by Claire, Sturge and Danya Glaser, which provided an analysis of the role of the father to his child:

The findings are that the position in law that parental involvement on both sides is indeed in the best interests of the child. In a paper commissioned by the Official Solicitor, Claire, Sturge and Danya Glaser, 'Contact and Domestic Violence — The Experts' Court Report' [2000] Fam Law 615 ('The Experts' Court Report') at pp 616–617, the authors comment that:

> Contact with fathers, as opposed to other family members or people with whom the child has a significant relationship, brings the following, in particular, to bear, although the general principles remain the same:
>
> (a) the father's unique role in the creation of the child;
>
> (b) the sharing of 50% of his or her genetic material;
>
> (c) the history of his or her conception and the parental relationship;
>
> (d) the consequent importance of the father in the child's sense of identity and value;
>
> (e) the role modelling a father can provide of the father's and male contribution to parenting and the rearing of children which will have relevance to the child's concepts of parental role models and his or her own choices about choosing partners and the sort of family life he or she aims to create.
>
> ...
>
> In summary, the benefits include the meeting of his or her needs for:
>
> (a) warmth, approval, feeling unique and special to a parent;
>
> (b) extending experiences and developing (or maintaining) meaningful relationships;
>
> (c) information and knowledge;
>
> (d) reparation of distorted relationships or perceptions.

[68] It must also be remembered that the provisions of the Law Reform (Marriage and Divorce) Act were discussed, deliberated and determined during a time when the demarcation of the role of a father and mother was clear, where most women were stay-home mothers, to manage the household and raise children, whilst fathers were mere breadwinners for the family. However, a whole generation has transitioned since the Law Reform (Marriage and Divorce) Act was enacted and along with it, there has since been a shift in cultural norms. As such, the role of a father is no longer relegated to secondary status. The relationship between a father and child has evolved and is more complex than one assumes.

[69] It cannot be gainsaid, therefore, that a child needs both parents, in the gender-binary sense, as it stands in our society today. Both parents have invaluable contributions to make to a child's life. Hence, not all fathers should

A be painted with the same brush, as there are some who take a more active role in raising children, whilst others undeniably sit back and leave their children to be raised by their wives and domestic help.

B **[70]** At this juncture, reference was made to the Singapore case of *CX v CY* [2005] 3 SLR 690, where the Court of Appeal recognised the importance of joint parenting and established the preferable position to preserve the concept of joint parental responsibility.

C **[71]** Following from this, I took the view that both plaintiff and defendant should co-parent the children, the significance of which has been highlighted in s 5 of the Guardianship of Infants Act, which reads:

Section 5 — Equality of parental rights

D (1) In relation to the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the income of any such property, *a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal.*

E (2) The mother of an infant shall have the like powers of applying to the Court in respect of any matter affecting the infant as are possessed by the father. (Emphasis added.)

F **[72]** Pursuant to s 3 (Duties of guardian of person) of the Guardianship of Infants Act, both parents, therefore, have equal responsibilities for the children's support, health, and education. The correlation to the parties' responsibilities is the rights of the children, in this case, the right to bond with both parents.

G **[73]** In the upshot, based on the aforesaid reasons, and after careful scrutiny of all the evidence before this court, and submissions of both parties, this application was dismissed, and it was ordered that the parties would have joint guardianship and custody with primary care and control to the defendant; whilst the plaintiff would have access to the children, specifics of which have

H been stipulated in the order.

Application dismissed.

Reported by Ahmad Ismail

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